Supreme Court of the United States

OCTOBER TERM, 1946

No. 625

PETER CALDAROLA, (Plaintiff-Appellant in the Court below),
Petitioner-Appellant,

—against—

MOORE-McCORMACK LINES, INC.,
Defendant,

—and—

GERDA ECKERT and THOR ECKERT, JR., partners doing business under the firm name of THOR ECKERT & CO., (Defendants-Respondents in the Court below),
Respondents-Appellees.

SUPPLEMENTAL BRIEF FOR PETITIONER-APPELLANT SUBMITTED PURSUANT TO LEAVE OF THE COURT.

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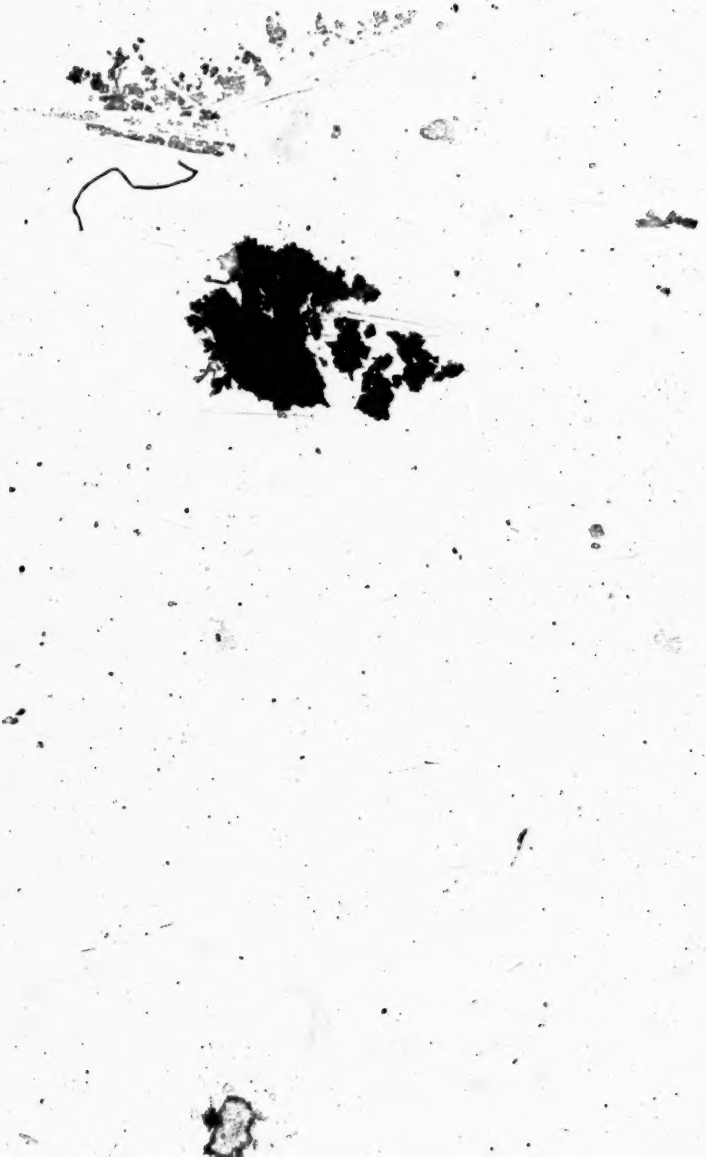

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SUPPLEMENTAL BRIEF FOR PETITIONER SUBMITTED PURSUANT TO LEAVE OF THE COURT.

POINT I.

The Supreme Court has jurisdiction of all maritime torts irrespective of diversity of citizenship or the amount involved.

During the argument before this Court, the question

was raised by some members of the Court as to whether there was jurisdiction to review where no diversity of citizenship existed. As we understand the rule, where the action is brought for a maritime tort, it may be instituted either in the Federal or in the State Court. In either case, the maritime law applies and the State Court is not at liberty to change the maritime law by applying a local law thereto.

The facts in the case of *Robins v. Dahl*, 266 U. S., page 449, were similar to the facts in the case at bar. The parties were residents and citizens of the State of New York and the action was brought in the State Court. There was no diversity of citizenship. The Trial Judge applied the local law to a maritime tort. This Court reversed the judgment of the State Court. Mr. Justice McReynolds delivered the opinion of the Court at page 454:

> "Defendant in error Dahl brought an action against the Robins Company—plaintiff in error—a New York corporation, in the Supreme Court, Kings County, New York, to recover damages for personal injuries. He alleged: That on February 2, 1920, while employed by the Robins Company and doing repair work on the steamer "El Occident", then lying in navigable water at Brooklyn, a plank scaffold on which he was walking or standing broke and caused him to fall into the hold. That he sustained serious injuries caused solely by and through negligence in that the company did not furnish a safe place to work and failed to provide a safe scaffold as required by the Labor Laws of the State of New York, but negligently and carelessly furnished an unsafe, inadequate and unsuitable scaffold and plank."

At page 457 this Court stated:

"The alleged tort was maritime suffered by one doing repair work on board a completed vessel. The matter was not of mere local concern, as in *Grant Smith-Porter Ship Co.* v. *Rhode*, 257 U. S. 469, 476, but had direct relation to navigation and commerce, as in *Great Lakes Dredge & Dock Co.* v. *Kierejewski*, 261 U. S. 479. The rights and liabilities of the parties arose out of and depended upon the general maritime law and could not be enlarged or impaired by the state statute. *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372, 382; *Union Fish Co.* v. *Erickson*, 248 U. S. 308; *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149; *Carlisle Packing Co.* v. *Sandanger*, 259 U. S. 255, 259. They would not have been different if the incident had occurred at San Francisco.

The jury were distinctly told that they might consider the provisions of the local law in deciding whether or not the employer was negligent. No such instruction would have been permissible in an Admiralty Court, and it was no less objectionable when given by the State Court. The error is manifest and material. See *Central Vermont Ry. Co.* v. *White*, 238 U. S. 507, 511; *New Orleans & N. E. R. R. Co.* v. *Harris*, 247 U. S. 367, 371; *American Railway Express Co.* v. *Levee*, 263 U. S. 19, 21.

The judgment must be reversed."

The issue before this Court is the interpretation of a general agency agreement entered into by the War Shipping Administration with the respondents. The War

Shipping Administration was created by the proclamation of the President of the United States. The President, in turn was authorized by an Act of Congress to create all bureaus, agencies and departments as they became necessary. The President's authority appears on pages 16, 17 and 18 of this brief.

The case of *Illinois Steel Co.* v. *B. & O. R. R. Co.*, 320 U. S. 508, dealt with a situation similar to the case at bar. In that case the interpretation or construction of the clauses of a bill of lading adopted by the Interstate Commerce Commission pursuant to Congressional authority was before the Court for interpretation. Mr. Chief Justice Stone speaking for the Court at page 510, stated:

> "Since the clauses of the uniform bill of lading govern the rights of the parties to an interstate shipment and are prescribed by Congress and the commission in the exercise of the commerce power, they have the force of Federal law and questions as to their meaning arise under the laws and Constitution of the United States. Hence, we have jurisdiction to review their determination by the State Courts in a suit by the carrier to recover freight charges."

The employment of the petitioner on a vessel in navigable waters being under a maritime contract, the law as declared by this Court should be followed by the State Court, for the maritime law is not subject to limitation by the State Court interpretation or decision. (*Union Fish Company* v. *Erickson*, 248 U. S. 308), and on these questions there must be uniformity throughout the United States. It is to enforce these principles that this Court takes jurisdiction in such cases erroneously

decided by State Court. (*Knickerbocker* v. *Stewart*, 253 U. S. 149, 160; *Chelentis* v. *Luckenbach S. S. Co.*, 243 U. S. 372.)

In the case of *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, this Court at page 254, stated:

> "So here in trying this case the State Court was bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected. Whether it did so, raises a federal question reviewable here under Sec. 237 (b) of the Judicial Code, 28 U. S. C., Sec. 344 (b), 28 U. S. C. A., Sec. 344 (b)."

The case of *Kennedy* v. *Cunard Steamship Co.*, 197 App. Div., page 359, affirmed by the Court of Appeals in 235 N. Y., page 604, was instituted in the State Court. The plaintiff brought suit for personal injuries sustained while he was employed as a longshoreman on a vessel alongside of one of the piers in New York City. The Appellate Division of the Supreme Court of the State of New York held that the action could be brought in the Federal or State Court, and under the Constitution of the United States, the maritime law was applicable and not the common law of the State of New York. The Court, at page 466, stated:

> "Article 3, Section 2, subdivision 1, of the Constitution of the United States extends the judicial power of the United States to all cases of admiralty and maritime jurisdiction. Article 1, Section 8, subdivision 18, gives Congress the power to make all laws necessary for the execution of the powers granted. By Section 9

> of the Judiciary Act of 1789 the District Courts of the United States were given 'exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, * * * saving the suitors, in all cases, the right of a common law remedy where the common law is competent to give it.' This grant was continued by the United States Revised Statutes, Sections 563 and 711, and by the Judicial Code, Sections 24 and 256. There have been numerous decisions construing this section. These cases settle the law to be that actions in rem, whether arising under the general maritime law or to enforce liens given by the United States or local state statutes, must be prosecuted in admiralty in the United States Courts, while actions in personam, arising out of maritime contracts or torts, may be brought in admiralty or on the law side of the United States Court or in a state court having an appropriate common law remedy.' * * *."

In the case of *Belden* v. *Chase*, 150 U. S., page 674, this Court, on page 691, stated:

> "This action was for a maritime tort committed upon navigable waters and within the admiralty jurisdiction, and the Appellate jurisdiction of this Court over questions of national and international in their nature cannot be restrained by the mere fact that the party plaintiff has elected to pursue his common law remedy in a state court."

In the case of *Seas Shipping Co.* v. *Sieracki*, 328 U. S., page 85, this Court, at page 99, stated:

"It is that for injuries incurred while working aboard the ship in navigable waters the stevedore is entitled to the seaman's traditional and statutory protections, regardless of the fact that he is employed immediately by another than the owner. For these purposes he is in short a seaman because he is doing a seaman's work and incurring a seaman's hazards."

POINT II.

The State Court of Appeals modified the maritime law and applied the decision of Cullings v. Goetz, 256 N. Y. 287 to the facts in the case at bar.

The State Court of Appeals in its decision in the case at bar and its reliance upon the decision in the case of *Cullings* v. *Goetz, supra,* as the law of the case, modified the maritime law as enunciated by this Court in the cases of *Quinn* v. *Southgate Nelson Corp.*, 121 Fed. 2d, 190; *Brady* v. *Roosevelt Steamship Co.*, 317 U. S. 575; *Hust* v. *Moore-McCormack Lines*, 328 U. S. 734 and *Seas Shipping* v. *Sieracki*, 328 U. S. 85. The manner in which the maritime law was modified disapproved of or changed by the New York State Court of Appeals is as follows:

1. The State Court of Appeals modified the maritime law in holding that a general agent owed no duty to the petitioner, a longshoreman, to keep the vessel in a good condition of repair.

This Court has ruled otherwise in the cases of *Quinn* v. *Southgate Nelson Co., supra, Brady* v. *Roosevelt Steamship Co., supra* and *Hust* v. *Moore-McCormack Lines, supra.*

2. The State Court of Appeals modified the maritime law in holding that the agent must be in absolute control before he may be held liable. This Court has ruled that an agent will be deemed liable if he has a measure of control as distinguished from absolute control.

The Court of Appeals in the *Cullings* v. *Goetz, supra,* on pages 289, 290, stated:

> "Liability in tort must be confined to the lessee whose possession and dominion were exclusive and complete."

On page 290 the Court stated:

> "The power to control * * * implies the power and the right to admit people to the premises and to exclude people from them."

This Court has not followed the narrow construction of liability against an agent as expounded by the Court of Appeals in the *Cullings* v. *Goetz, supra* case. The agent may be in joint control with others and yet be responsible for his failure to make repairs pursuant to his obligation. If he has access to the vessel and a sufficient measure of control, he will be deemed to be liable. In the case of *Quinn* v. *Southgate Nelson Corp.*, 121 Fed. 2d, page 190, which was mentioned with approval by this Court in the case of *Brady* v. *Roosevelt Steamship Co., supra* and *Hust* v. *Moore-McCormack Lines, Inc., supra* the Circuit Court of Appeals, on page 191, stated:

> "Common sense and the precedents make the applicant liable on the facts in this case. It had a most substantial measure of control over the operation of the vessel. It was paid to manage, operate and conduct the business of the line. The reserved powers of the owner could not possibly have been so burdensome as to deprive appellant of defacto control, and there is no showing that in fact the owner did substitute itself as manager either generally or at the time of the accident. Even if the Maritime Commission selected the officers as appellants contend, the appellant was not ousted of control."

When we compare the decision of the Circuit Court of Appeals in the *Quinn* case which holds that only partial control is necessary and expounds the true principle of an agent's obligation for a maritime tort with the decision of the Court of Appeals in the *Cullings* v. *Goetz, supra*, case, we find that the theory of the agent's liability for a maritime tort has been modified by the Court of Appeals in the *Cullings* v. *Goetz* case. The *Quinn* case holds the agent liable because

> "It had a most substantial measure of control over the operation of the vessel."

The *Cullings* decision holds that in order for an agent to be liable, control must be so absolute over the premises that the occupant would have "the power and the right to admit people to the premises and to exclude people from them".

3. The State Court of Appeals modified the maritime law in deciding that the agency agreement and the rules and regulations issued thereunder required the

agent to conduct the ship's business as distinguished from its physical operation. This Court in the cases mentioned under this point found to the contrary. The data which the petitioner has set forth in his briefs shows clearly that the agent had a measure of control over the operation of the vessel.

4. The State Court of Appeals modified the maritime law when it applied the rules of private agency contrary to the decision of this Court in the case of *Hust* v. *Moore-McCormack Lines, supra.* This Court in its decision in the *Hust* case stated:

> "Here indeed is the respondent's falacy, for it assumes the case would be controlled by the common law rules of private agency—no such application of the common law control test can be justified in this temporary situation unless by inversion of that wisdom which teaches that 'the letter killeth, but the spirit giveth life'."

In the case of *S. R. A.* v. *Minnesota*, 66 Supreme Court Reports, 749, decided by this Court, March 25, 1946, this Court stated:

> "In determining the meaning and effect of contracts to which the United States is a party, the governing rules of law must be finally determined by this Court."

5. The State Court of Appeals did not consider Article 3, Section 2, subdivision 1 of the Constitution of the United States and failed to apply the general principles of the maritime law to the facts in the case at bar.

6. The State Court of Appeals refused to follow this Court's ruling in the case of *Hust* v. *Moore-McCormack*, 328 U. S. 734. In referring to the *Hust* decision, the State Court of Appeals in its decision, said:

> "The majority opinion in the Supreme Court holds only that the Jones Act should be liberally construed so as to give Hust a cause of action thereunder against the general agent. A concurring opinion by two of the Supreme Court Justices in the *Hust* case goes much further and construes the general agency contract as putting the agent in possession and in control of the ship. Since that minority holding is not the holding of the court we are not bound to follow it nor to decide whether if it were the decision of the court we should have to follow it, as being on a question of maritime law or because it is a construction of a contract to which the United States is a party. (See *S. R. A.* v. *Minnesota*, 90 Law Ed., Advance Opinions, 663, 666.)"

The facts in the case of *S. R. A.* v. *Minnesota*, *supra*, were entirely different from the facts in the case at bar. In that case the State of Minnesota claimed a lien against real property owned by a citizen of the State of Minnesota. This Court held that the laws of Minnesota governed. The question involved here is not of local concern, but is a maritime question, and therefore a Federal question to be determined by Federal Law.

The Government counsel, on pages 20 and 21 of their brief, *amicus curiae*, state:

> "The court below appears to have decided the present case in reliance upon *Callings* v. *Goetz*,

256 N. Y. 287, 290, holding that 'Liability in tort is an incident to occupation or control'. While that may be the local rule in New York, we do not think that it necessarily controls this case. From the decisions of this court it seems clear that petitioner's right to recover depends on maritime law and not on New York law. *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 88; *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 243; *Intagliata* v. *Shipowners & Merchants Towboat Co.*, 26 Cal. 2d, 365. A right sanctioned by the maritime law may be enforced in the state courts but nothing gives the complaining party 'an election to determine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law.' *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372, 384; *Colonna Shipyard* v. *Bland*, 150 Va. 349, 385. If, as appears, this case is here as one of first impression under the law maritime, this Court may, as in other cases governed by federal law, resort to the customary materials of decision in fashioning a rule."

POINT III.

The maritime law must be universally applied by the State and Federal Courts.

Where a State Court applies a local law to a maritime tort, this Court has jurisdiction to correct the error.

In the case of *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S., 149, this Court, at page 166, stated:

> "Obviously if every state may freely declare the rights and liabilities incident to maritime employment, there will at once arise the confusion and uncertainty which framers of the Constitution both foresaw and undertook to prevent."

This Court in the *Knickerbocker Ice Co.* v. *Stewart*, *supra*, at page 160, stated:

> "As the plain result of these recent opinions and the earlier opinions upon which they are based, we accept the following doctrine; the Constitution itself adopted and established as part of the laws of the United States, approved rules of the general maritime law and empowered Congress to legislate in respect of them and other matters within the Admiralty and maritime jurisdiction. Moreover, it took from the States all power, by legislation or Judicial decision, to contravene the essential purpose; of, or, to work

material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within the control of the Federal Government was the fundamental purpose; and to such definite end Congress was empowered to legislate within that sphere.

Since the beginning, Federal Courts have recognized and applied the rules and principles of maritime law as something distinct from laws of the several states—not derived from or dependent on their will. The foundation of the right to do this, the purpose for which it was granted, and the nature of the system so administered, were distinctly pointed out long ago. That we have a maritime law of our own, operative throughout the United States, cannot be doubted * * * one thing, however, is unquestionable; the Constitution must be referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states.' *The Lottawanna*, 21 Wall. 558, 574, 575. The field was not left unoccupied; the Constitution itself adopted the rules concerning rights and liabilities applicable therein; and certainly these are not less paramount than they would have been if enacted by Congress. Unless this be true it is

quite impossible for a multitude of adjudications by admiralty courts. See *Workman* v. *New York City*, 179 U. S. 552, 557, *et seq.*

The distinction between the indicated situation created by the Constitution relative to maritime affairs and the one resulting from the mere grant of power to regulate commerce without more, should not be forgotten. Also, it should be noted that federal laws are constantly applied in state courts—unless inhibited from duty so requires. Constitution, Article VI, Clause 2, Second Employers' Liability Case, 223, U. S. 1, 55. Consequently mere reservation of partially concurrent cognizance to such courts by an act of Congress conferring an otherwise exclusive jurisdiction upon National Courts, could not create substantive rights or obligations or indicate assent to their creation by the states."

POINT IV.

The federal laws regulating shipping, commerce, ships and wharves give jurisdiction to this Court.

Title 28 U. S. Code, Section 41 (8) states:

"The district courts shall have original jurisdiction as follows:

* * * * * * * * *

Eighth: Of all suits and proceedings arising under any law regulating commerce. (Mar. 3, 1911, C. 231, Sec. 24, par. 8, 36 Stat. 1092; Oct. 22, 1913, C. 32, 38 Stat. 219.)"

In *35 Corpus Juris Secundum*, at page 848, the following appears:

> "A suit or proceeding is within the jurisdiction of the district courts, if it arises under a federal law regulating commerce, without regard to the amount in controversy or diversity of citizenship. Judicial Code, Sec. 24 (8) 28 U. S. C. A., Sec. 41 (8)."

The action instituted by the petitioner was one which concerned commerce. Loading and discharging a vessel is considered in aid of commerce. The Courts have so held.

The War Shipping Administration owned the vessel upon which the petitioner was injured. The War Shipping Administration and the respondents, as general agents, entered into the agreement, Plaintiff's Exhibit 1. In addition to this agreement, the War Shipping Administration issued rules and regulations subsesequent to the execution of the agency agreement referred to and which had been submitted to this Court in book form marked Defendant's Exhibit 6.

The War Shipping Administration was created by the proclamation of the President of the United States. The President, in turn, was authorized by an Act of Congress to create all bureaus, agencies and departments which became necessary. The President by proclamation substituted the War Shipping Administration in place of the Maritime Commission, and transferred all the duties of the Maritime Commission relating to the vessels used in commerce, to the War Shipping Administration. Therefore, the interpretation of the agency agreement, Plaintiff's Exhibit 1, is the interpretation of an instrument formed pursuant to a statute created by Congress. The President's proclamation is an Act

under the authority of Congress and has the force of law.

If the general agents, the respondents in the case at bar, violated the terms of the agency agreement, the violation and the interpretation of such agreement to ascertain whether it was violated constitutes a Federal question.

By executive order number 9054, February 7, 1942, 7 Federal Register 837, as amended by Ex. Or. 9244, September 16, 1942, 7 Federal Register 7327, there was established a War Shipping Administration in the executive office of the President and defining its functions and duties pursuant to the First War Powers Act, *supra*, the executive order 9054 states:

> "By virtue of the authority vested in me by the Constitution and Statutes of the United States, including the First War Powers Act, 1941 (Tit. 50 U. S. C., App. Secs. 601, 602), approved December 18, 1941, as President of the United States and as Commander-in-Chief of the Army and Navy, and in order to assure the most effective ultilization of the shipping of the United States for the successful prosecution of the war, it is hereby ordered:
>
> 1. There is established within the office for Emergency Management of the Executive Office of the President a War Shipping Administration under the direction of an administrator who shall be appointed by and be responsible to the President.
>
> 2. The administrator shall perform the following functions and duties:
>
> • • • • • • • •

> 3. The functions, duties and powers conferred by law upon the United States Maritime Commission with respect to the operation, purchase, charter, insurance, repair, maintenance and requisition of vessels and facilities required for the operation thereof and the issuance of warrants with respect thereto under the Merchant Marine Act of 1936, * * * and under any other provisions of law, including Executive orders, are hereby transferred to the Administrator; * * *"

In the case of *In Re United States* v. *Oregon*, 295 U. S., page 1; Mr. Justice Stone in writing the opinion at page 125 stated:

> "The executive order setting aside the area in question as a bird reservation was an assertion of title and possession."

On page 127 the Court stated:

> "The construction of grants by the United States is a Federal, not a State question."

In the case of *Mulford* v. *Smith*, 307 U. S., page 38, the Court, at page 48, stated:

> "Before coming to the merits we inquire whether the court below had jurisdiction as a federal court or as a court of equity. Though no diversity of citizenship is alleged, nor is any amount in controversy asserted so as to confer jurisdiction under subsection (1) U. S. C. Tit. 28, Sec. 41 (1) of Section 24 of the Judicial Code, the case falls within subsection (8) U. S. C. Tit.

28, Sec. 41 (8) which confers jurisdiction upon District Courts of all suits and proceedings arising under any law regulating commerce."

* * * * * * *

At page 48:

"Any rule, such as that embodied in the Act, which is intended to foster, protect, and conserve that commerce, or to prevent the flow of commerce from working harm to the people of the nation, is within the competence of Congress. Within these limits the exercise of the power, the grant being unlimited in its terms, may lawfully extend to the absolute prohibition of such commerce, and a fortiori to limitation of the amount of a given commodity which may be transported in such commerce. The motive of Congress in exerting the power is irrelevant to the validity of the legislation."

In the case of *Robins* v. *Dahl, supra*, this Court at page 457, stated:

"The alleged tort was maritime suffered by one doing repair work on board a completed vessel. * * * The matter was not of mere local concern, as in *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U. S. 469, 476, *but had direct relation to navigation and commerce*. * * *." (Italics ours.)

The case of *Katz* v. *United States Shipping Board Emergency Fleet Corp.*, 32 Fed. 2d, page 14, decided by Judge Campbell in the United States District Court for the Eastern District of New York on March 5, 1929 involved a state of facts similar to the facts in the case at bar.

The Court there held that the statute relating to commerce applies in an action brought by one injured on a vessel in navigable waters. While it is true Judge Campbell did not mention anything about diversity of citizenship, he did state in his opinion that the Federal Court had jurisdiction irrespective of the amount involved. Judge Campbell in his opinion, stated:

> "This is a motion made by the plaintiff to remand to the Municipal Court of the City of New York the above entitled action.
>
> The action was brought to recover for injuries alleged to have been sustained by the plaintiff, a visitor to a ship and lawfully traversing a passageway on Pier 4, Hoboken, caused by the defendants placing and permitting an obstruction thereto.
>
> The action arises under a law regulating commerce, within the intent and meaning of subdivision 8 of section 24 of the Judicial Code, and therefore this Court has jurisdiction, although the amount involved is but $1,000. *Harry Porter Co.* v. *United States Shipping Board Emergency Fleet Corporation (D. C.)*, 284 F. 397; *Hill* v. *United States Shipping Board Emergency Fleet Corporation (D. C.)*, 284 F. 398.
>
> The motion is denied."

POINT V.

The petitioner having been injured on federal property while the vessel was in navigable waters, this Court irrespective of all other grounds has jurisdiction of the subject matter.

The War Shipping Administration owned the vessel upon which the petitioner was injured. The agency agreement under which petitioner's cause of action arose was entered into by the War Shipping Administration with the respondents pursuant to the proclamation of the President of the United States who in turn received his power to do so from an Act of Congress as hereinbefore mentioned.

The petitioner was injured on a government owned vessel, which was in navigable waters. The action in the first instance could have been brought in the Federal Court. Under the circumstances, jurisdiction is vested in this Court.

POINT VI.

Although the Government contends that the respondents were liable to the petitioner, it urges this Court to make no finding of operation and control.

The Government does admit that there was limited control on the part of the respondents sufficient to permit them to make repairs.

On page 22 of their brief, the attorneys for the Government state:

> "The rationale of the rule is plain and would appear to be equally applicable here. If the agent binds himself by contract exclusively to inspect, maintain and repair the property, he creates the risk that his failure to perform his obligation will cause injury to innocent third parties. Consequently, the agent is under a duty to such parties to save them harmless from that risk. For the negligent breach of that duty the law imposes liability on the agent."

On page 18, the Government attorneys state:

> "A holding that respondent was not in possession of the vessel nor the employer of the crew within the rule of respondeat superior is not incompatible with respondent's liability upon the record now before the Court."

On page 4 of its brief, the Government contends:

> "In numerous situations it is of the greatest importance that the United States and not its general agents be held to be the owner in possession and control of its cargo vessels. If the general agent be held to be the owner pro hac vice in possession and control, the United States will be required to defend before juries in the state courts suits brought against its general agents on account of negligent navigation by the master and crew of its cargo vessels."

The position thus far taken by the attorneys for the Government seems somewhat inconsistent with their later admission that the general agents, the respondents, did have limited control sufficient to make repairs. On page 21 of their brief, the attorneys for the Government state:

> "An analogous situation is found in the case of managing agents who, while having neither possession nor physical control of property, have entire charge of its operation so as to be exclusively responsible for its maintenance. *Such agents, known as 'real estate management companies', have an implied license to enter and exercise the limited control necessary to make inspections and repairs.* Their liability has been summarized in Section 387 of the American Law Institute, Restatement of the Law of Torts, as follows:
>
> 'An independent contractor or servant to whom the owner or possessor of land turns over the entire charge thereof is subject to the same liability for harm caused to others within or outside the land by his failure to

exercise reasonable care to maintain the land in safe repair as though he were the possessor of the land.'

And see Restatement, Agency, Section 354; Comments, a, c, and d; 1 Mechem, Agency (2d ed., 1914), pp. 1086-1092." (Italics ours.)

POINT VII.

The general agency agreement was prepared with the intention of eliminating jury trials.

When the war was declared, the Government sought experienced ship operators to conduct the operation of its merchant marine. With that in view the general agency agreement was prepared. In preparing this agreement, much thought was given by those whose interest would be served to eliminate jury trials and so the agreement (Petitioner's Exhibit 1) was prepared. Words were used in one portion of the agreement which intended to place the operation and control of the vessels in the hands of the Government. Nevertheless, the Government had to put into the agency agreement and in the subsequent rules and regulations now before this Court the duties which the general agents were to discharge. These duties undoubtedly contradicted the words which were used in other portions of the agency agreement and made the agents the custodians and in control of the vessels. We say sincerely that this is another instance where actions speak louder than words. The mere fact that the agency agreement contains words to the effect that the

operation of the vessel shall be under the control of the Government is not binding when the actual duties discharged by the agent under the agency agreement points to operation and control.

Respectfully submitted,

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FILE COPY

OCT 29 1946
CHARLES ELMORE CROPLEY

Supreme Court of the United States

No. 625, October Term, 1946.

Peter Caldarola (Plaintiff-Appellant in the Court below),
Petitioner,

against

Moore-McCormack Lines, Inc.,
Defendant,

and

Gerda Eckert and Thor Eckert, Jr., partners doing business under the firm name of Thor Eckert & Co. (Defendants-Respondents in the Court below),
Respondents.

CONSENT OF RESPONDENTS TO GRANTING PETITION FOR CERTIORARI

Now comes Gerda Eckert and Thor Eckert, Jr., partners doing business under the firm name of Thor Eckert & Company, and consent to the granting of the petition for Writ of Certiorari herein, but without accepting or adhering to any of the arguments set out in the petition, and still disputing them. They also urge the court to grant the petition, because they are of the opinion that it is desirable that the questions left undecided by the decision of this court in *Hust* v. *Moore-McCormack Lines, Inc.*, decided June 10, 1946, should be decided now by a full bench. Thus, there will end such confusion as has been indicated in the decision of *Militano* v. *United States of America*, 156 F. 2d

99, where, apparently, the court thought that the *Hust* decision required a result which obtained the support of only two of the judges of the Supreme Court who participated in the decision.

RAYMOND PARMER,
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